Litigation Division Notes

Court Dismisses Suit Seeking to Stop "War Against Terror"

Since 11 September 2001, U.S. military personnel from active and reserve component units have deployed around the world in the fight against terrorism. Recently, Mr. James Johnson, a pro se plaintiff, filed suit in the U.S. District Court for the Western District of Texas to enjoin President Bush and members of Congress from using military force in the "War Against Terror."[1] Specifically, Mr. Johnson complained that the President's mobilization and deployment of U.S. forces to Afghanistan, and Congress's decision to fund these efforts, without a formal declaration of war were unconstitutional and violated Executive Order 11,905, which forbids political assassination.[2] On 25 March 2002, the district court granted the government's motion to dismiss Mr. Johnson's complaint, holding (1) that Mr. Johnson lacked standing, and (2) that Johnson's complaint raised nonjusticiable political questions.[3]

Standing

To have standing, Mr. Johnson had to demonstrate to the district court that "he suffers an injury-in-fact that is fairly traceable to the [government's] challenged conduct that is likely to be redressed by the relief he seeks from the court."[4] To meet the injury-in-fact requirement, "[Mr. Johnson] must allege an injury that is 'concrete and particularized,' and 'actual or imminent, not conjectural or hypothetical.'"[5]

Mr. Johnson alleged, without further elaboration, that the president and Congress's acts injured him and others by "depriving them of the wealth of their heritages."[6] The United States argued that because Mr. Johnson's vague allegation "purports to represent such a large class of all American taxpayers, or perhaps even all American citizens, he admittedly suffered the same harm as large numbers of Americans."[7] The district court agreed, determining that Mr. Johnson "merely asserted a generalized grievance, not a particularized injury, and did not meet the injury-in-fact requirement."[8]

The court also analyzed Johnson's standing to sue as a taxpayer.

> [To] have standing to challenge Congress's exercise of tax-and-spend power under Article I, a plaintiff must establish: (1) a logical link between their taxpayer status and the type of legislation attacked; and (2) a nexus between taxpayer status and the precise nature of the constitutional infringement alleged.[9]

The court found that Johnson's complaint, by challenging Congress's enactment of the Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States (Terrorist Appropriations),[10] met the first part of this test. But, the court determined that Johnson failed "to show that the [Terrorist Appropriations] exceed[ed] specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power, and not simply that the [Terrorist Appropriations] were generally beyond the powers delegated to Congress by Article I, section 8."[11] Instead, the court found that Johnson "simply disagree[d] with Congress's decision to use its tax-and-spend power to appropriate money to the President to respond to the terrorist attacks."[12]

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1. Johnson v. United States, No. A-01-CA-632-88, slip op. (W.D. Tex. Mar. 25, 2002).

2. *Id*. at 2. Executive Order 11,905, signed by President Ford in 1976, states in part: "No employee of the United States Government shall engage in, or conspire to engage in, political assassination." Exec. Order No. 11,905, Fed. Reg. 7703 (Feb. 18, 1976).

3. *Johnson*, No. A-01-CA-632-88, slip op. at 10.

4. *Id.* at 3 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

5. *Id.* (quoting *Lujan*, 504 U.S. at 560 (citations omitted)).

6. *Id.* (quoting Plaintiff's Response at 3).

7. *Id.* at 4.

8. *Id*. Furthermore, the district court determined that Johnson's injuries were too "abstract and indefinite" to establish standing. *Id.* Comparing Johnson's complaints to those raised in *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974), the *Johnson* court stated it "will respect the Supreme Court's caution against creating 'government by injunction' based on an abstract injury." *Johnson*, No. A-01-CA-632-88, slip op. at 6 (quoting *Schlesinger*, 418 U.S. at 222). The plaintiffs in *Schlesinger* brought a class action lawsuit to enjoin members of Congress from simultaneously serving in the Reserve Armed Forces. *Schlesinger*, 418 U.S. at 212.

9. *Johnson*, No. A-01-CA-632-88, slip op. at 6 (citing Flast v. Cohen, 392 U.S. 83, 102-03 (1968)).

10. Pub. L. No. 107-38 (Sept. 18, 2001).

Therefore, Mr. Johnson's taxpayer status did not give him standing to sue in federal court.[13]

Political Questions

Government counsel argued that Johnson's petition to enjoin the President and Congress from engaging and funding a war in Afghanistan without a formal declaration of war presented the district court with nonjusticiable political questions. The determine if Johnson's allegations presented nonjusticiable political questions, the district court applied the test of *Baker v. Carr.*[14]

> To determine if a case presents a nonjusticiable political question, the court needs to consider whether there is (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department;" (2) "a lack of judicially manageable methods for resolving the issue;" or (3) other prudential reasons for not intervening, such as "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made."[15]

Agreeing with the government, the district court noted that "Article I, Section 8 gives Congress the power to declare war; [and] Article II, Section 2 names the President commander-in-chief of the U.S. military."[16] Therefore, "the Constitution commits the power to declare war and to pursue military action to other branches of government, and [not to the courts]."[17]

The district court also recognized that "prudential concerns cautioned against deciding the political questions before it."[18] The court noted that "[Johnson's case] involves Congress and the President's highly sensitive foreign policy choices that necessarily impact national security."[19] The court cited "potential consequences to national security, foreign relations, and the balance of power among the branches of government that could flow from the court's adjudication of this case" as sufficient reason to refrain from hearing Johnson's complaints.[20]

Conclusion

Mr. Johnson's complaints against the "War Against Terror" amounted to vague allegations raising issues clearly committed in the Constitution to the executive and legislative branches. By granting the government's motion to dismiss, the district court's decision is in keeping with a long line of cases which hold that courts do not become involved in cases in which "the plaintiff has no concrete and particularized injury but merely an ideological disagreement with Congress and the President."[21] CPT Witherspoon.

World War II Takings Case Dismissed

Introduction

In a recent decision involving a takings claim under the Fifth Amendment,[22] the Court of Federal Claims (COFC) determined that the six-year statute of limitations governing claims against the United States[23] barred the plaintiffs' case. The COFC's dismissal of *Hair v. United States*[24] illustrates the rule that when a plaintiff bases a taking claim upon the govern-

11. *Johnson*, No. A-01-CA-632-88, slip op. at 7 (citing *Flast*, 392 U.S. at 102-03).

12. *Id*.

13. *Id*.

14. 369 U.S. 186 (1962).

15. *Johnson*, No. A-01-CA-632-88, slip op. at 8 (quoting *Baker v. Carr*, 369 U.S. at 217).

16. *Id*.

17. *Id*.

18. *Id*. at 9.

19. *Id*. (citing Atlee v. Laird, 347 F. Supp. 689, 696 (E.D. Penn. 1972)).

20. *Id*. at 9-10.

21. *Id*. at 10.

22. U.S. CONST. amend. V. The Takings Clause states: "nor shall private property be taken for public use, without just compensation." *Id*.

23. 28 U.S.C. § 2501 (2000). This section states that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." *Id*.

ment's ratification of a treaty, the six-year statute of limitations begins upon ratification, not when the government provides notice of a refusal to pay just compensation.[25]

Background

Plaintiffs Gilbert M. Hair and Ethel Blaine Millet are U.S. citizens who suffered at the hands of the Japanese during World War II. On 2 February 1942, the Imperial Japanese Army arrested Mr. Hair, then a child, along with his mother, and interned him at the Santo Tomas Internment Camp in the Philippines. There he suffered from malnutrition and disease until Allied forces liberated the camp in 1945. The Japanese captured Ms. Millet, then an Army nurse, on 11 May 1942, imprisoned her at Santo Tomas, where she suffered from malnutrition and physical injury until Allied forces freed her in 1945, as well.[26]

The plaintiffs, on behalf of themselves and others similarly situated,[27] filed suit in the COFC for one trillion dollars from the United States for injuries caused by Japan during World War II.[28] The plaintiffs asserted that the United States is

> liable to them for a taking without just compensation under the Fifth Amendment in connection with the April 28, 1952 ratification of the 1951 Treaty of Peace with Japan, known as the "San Francisco Peace Treaty."[29] Plaintiffs contend that as a result of the San Francisco Peace Treaty, the United States committed a "taking" of their claims for damages against Japan.[30]

In response, the United States filed a motion to dismiss, arguing that the statute of limitations barred this claim.[31]

Decision

For purposes of the decision, all parties agreed that the six-year statute of limitations applied to the plaintiffs' claim. Therefore, the only disputed issue was when the claim actually accrued.[32] The government argued that the statute of limitations began upon the ratification of the San Francisco Treaty in 1952. The plaintiffs argued that the six-year period did not begin until November 2001, when the government filed its motion to dismiss the plaintiffs' case.[33] The plaintiffs asserted that until this time, "they had a 'reasonable belief' that the government would make good on its 'implied promise to pay.'"[34]

Agreeing with the government, the COFC, assuming a taking had occurred, held that the plaintiffs had only until 1958 to

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24. No. 01-521C, 2002 U.S. Claims LEXIS 86 (Fed. Cl. Apr. 15, 2002).

25. *See id*. at *13; Alliance of Descendants of Texas v. United States, 37 F.3d 1478, 1481-82 (Fed. Cir. 1994).

26. *Hair*, 2002 U.S. Claims LEXIS 86, at *3-4.

27. Mr. Hair and Ms. Millet "purport[ed] to represent a class of between 437,025 and 600,000 members." *Id*. at *2 n.1.

28. *Id*. at *6. In addition to filing in the COFC,

> [the plaintiffs] have also filed suit in the District Court for the Eastern District of Illinois against the Japanese government, seeking one trillion dollars in damages for their injuries. *See* Rosen v. People of Japan, No. 01C-6864 (E.D. Ill. filed Sept. 4, 2001). The plaintiffs state in their complaint [at the COFC] that "any monies actually collected as a result of Rosen, will be set off against the present claim against the United States."
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> The plaintiffs also acknowledge[d] that the under War Claims Act, [50 U.S.C. app. §§ 2001-2007 (2000)], Congress established a commission to compensate U.S. citizens who were prisoners of war or internees during World War II. . . . Plaintiffs, however, [have contended] that [payments made under the Act] "did not . . . constitute just compensation."

Hair, 2002 U.S. Claims LEXIS 86, at *5-6.

29. Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45.

30. *Hair*, 2002 U.S. Claims LEXIS 86, at *1-2.

31. *Id*. at *2.

32. *Id*. at *7 & n.2. "Plaintiffs conced[ed] that 'there was a taking of private property for public use on April 28, 1952,' upon ratification of the San Francisco Peace Treaty." *Id*. at *7.

33. *Id*. at *8-9.

34. *Id*. at *9.

file their claim—six years from the ratification of the San Francisco Treaty.[35] The court stated that

> there is no support for plaintiffs' contention that a taking claim does not accrue until the government announces its refusal to pay just compensation, or that the government's action in effectuating the taking can be bifurcated from the government's obligation to pay for that taking in terms of the accrual of the taking claim.[36]

Furthermore, the court noted that "the only time the government's refusal to pay starts the statute of limitations clock is when a statute establishes a requirement for government payment." The court determined that the San Francisco Peace treaty did not set forth such a requirement.[37] Therefore, the government's refusal to pay was not relevant to the accrual of the plaintiffs' takings claim.[38]

Conclusion

The *Hair* decision serves as a reminder that the COFC will strictly construe the six-year statute of limitations, "as it pertains to the government's waiver of sovereign immunity."[39] *Hair* also states the rule that when the ratification of a treaty by the United States constitutes "the taking," absent tolling or an express provision requiring government payment, the statute of limitation begins when the government ratifies the treaty. Major Salussolia.

35. *Id.* at *17.

36. *Id.* at *13.

37. *Id.* at *13-14.

38. *Id.* at *14.

39. *Id.* at *13-14 (citing Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1577 (Fed. Cir. 1988)).